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BEFORE THE

Federal Communications Commission

WASHINGTON D.C.

In the Matter of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
Of Digital Television Broadcasters	)	

To: The Commission

JOINT COMMENTS OF NAMED STATE BROADCASTERS ASSOCIATIONS

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SUMMARY

The named State Broadcasters Associations joining in these comments (the "State Associations") believe that the Commission should wait until we know what broadcasters are going to do with their digital services before imposing new and overly burdensome requirements on them that will hinder the transition to digital. Because there are so many options today to obtain children's programming, many of which the Commission ignores, and because the advent of digital technology makes it more difficult to justify increased regulations based on scarcity, the Commission should hold off on any new children's programming obligations that have no connection to the digital transition.

In these comments, the State Associations address the additional burdens that the proposals in the NPRM will impose on digital broadcasters. Without knowing how broadcasters intend to use this new technology and without any factual basis to support its recommendations, it is premature for the Commission to require new and additional children's programming obligations for digital broadcasters.

The Commission's proposals also exceed its mandate under the Children's Television Act of 1990 and risk violating broadcasters' First Amendment rights. It is impermissible for the Commission to require specific types of programming. The Commission may only set general guidelines in order to determine that broadcasters are meeting their public interest obligations through their overall programming. The proposed rules establish categories of "Commission-approved programming" raising serious First Amendment concerns. Furthermore, the State Associations recommend that the Commission only apply its children's programming obligations to digital service provided on the "primary channel." Section 336 of the 1996

Telecommunications Act specifically prohibits the Commission from imposing additional children's television programming obligations on ancillary and supplemental services, one of the possible rules on which the Commission seeks comment.

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The Alaska Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Georgia Association of Broadcasters, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of

Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (each, a "State Association" and collectively, the "State Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby submit their joint comments in response to the *Notice of Proposed Rule Making ("NPRM")*, released October 5, 2000, in the above-captioned matter in which the Commission seeks comment on the children's television obligations of digital television broadcasters.

I. INTRODUCTION AND SUMMARY

Under their respective charters, each State Association has been established to protect and enhance the service and business of the free, over-the-air broadcast industry within its borders. Consistent with that common mission, they have caused the *NPRM* to be reviewed by counsel and have concluded that, while certain of the Commission's positions are meritorious, many of its proposals, if adopted would be unlawful either as a matter of constitutional or statutory administrative law. In the *NPRM*, the Commission seeks comment on the obligation of television broadcast licensees to provide educational and informational programming for children and the requirement that television broadcast licensees limit the amount of advertising in children's programs. It is our contention that these issues are not unique to the digital environment and the Commission should not destroy this great opportunity that we have to take advantage of the benefits of digital television by imposing new obligations that have no connection to the digital transition. The State Associations recommend that the Commission

hold off on imposing any new and additional children's programming obligations on digital television broadcasters before the technology has even had an opportunity to blossom. Any children's television obligations that are ultimately imposed should apply only to a station's primary channel and should be narrowly tailored so as to avoid any tension with broadcasters' First Amendment rights.

II. DISCUSSION

A. Imposing new and premature burdensome regulatory obligations will only hinder the development of digital television.

Digital television offers a multitude of new technological possibilities for the viewing public. However, digital television is still in its early stages of development. There are still many decisions to be made as to how broadcasters will utilize this technology. Broadcasters may choose to only provide one channel but with a very high-resolution picture (HDTV) or they may choose to multiplex, that is to provide multiple channels at standard resolution (SDTV). They may also choose to provide data or Internet services over their digital spectrum.

Because we do not yet know the answers to these questions, it is premature for the Commission to choose this transition to digital to impose new and arbitrary regulations. According to some estimates, it could be another ten years before digital television has full market penetration.[1] While we commend the Commission on its attempt to forestall any potential problems, it is imperative that we wait to see how digital television develops before we start imposing burdensome regulations that will only serve to slow the transition. By creating

[1] *See* "Written Testimony of Gary Chapman, President and CEO of LIN Television Corporation Before the House Telecommunications Subcommittee," July 25, 2000 (available on www.nab.org)

additional burdens for broadcasters, the Commission threatens to stifle innovation and experimentation, the very thing that will best serve the public interest and our obligation to our children.

The Commission should instead be taking this important opportunity to give broadcasters the freedom to explore new and innovative ways of fulfilling their public interest obligations. The President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee") itself recommended that the FCC apply a two-year moratorium on additional public interest obligations for stations that choose to multicast, in order for such stations to explore options and innovations.[2] The imposition of burdensome additions to the existing children's programming rules will only hinder and discourage creative use of the new digital technology and slow the transition to digital. It is paramount that the public first receive the benefits of digital television before we begin to impose new requirements. Moreover, there is no evidence to show that analog stations are not presently fulfilling their children's television obligations.

The Commission points out that the transition to digital is an important step in communications. In order to realize maximum benefits, the Commission should first allow the marketplace to evolve before imposing new obligations on digital broadcasters. Regulation should only be resorted to when there has been a recognizable market failure. There is no basis for the Commission to reach a conclusion that digital broadcasters will not meet their public interest obligations with respect to children when the technology is still in its infancy.

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[2] *See, Charting the Digital Broadcast Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* (1998).

B. When imposing new regulations, the FCC must have a factual basis for such regulation.

The FCC may not simply impose additional regulations on licensees without a factual and rational basis that supports the need for increased governmental involvement.[3] Since digital television is still in the process of being developed, there is no record yet developed that indicates that digital television broadcasters are failing in their obligation to promote the public interest by failing to meet the needs of our nation's children. Unless such a record exists, the Commission cannot arbitrarily impose additional children's programming requirements on broadcasters. Additionally, there is no evidence at all cited in the NPRM that would indicate that analog broadcasters are failing to meet their obligations to children's programming. Therefore, the Commission may not use the digital transition to do what it cannot do to analog broadcasters. There is no reason why digital broadcasters should be treated differently from analog broadcasters in this respect. Rather than increasing the burdens on digital broadcasters, the Commission should be allowing flexibility and increasing its deregulation efforts. In fact, the Commission has up to this point embraced an open and flexible policy with respect to digital television and the 1996 Telecommunications Act ("1996 Act") is deliberately flexible with respect to programming models for the digital era. The Commission should therefore be focusing its efforts on ensuring that the digital television transition be accomplished expeditiously and with as few impediments as possible. Particularly in the context of children's programming, additional FCC rules only result in creating disincentives to produce educational programming. To impose new rules at this point in time would be unduly burdensome on

[3] Burlington Northern Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962); HBO, Inc. v.F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.")

television broadcasters and would require them to place emphasis on matters other than the transition itself.

More importantly, the Commission gives no reason as to why the introduction of a new technology should create additional new obligations for broadcasters. The Commission lists several new guidelines and rules that purport to delineate how a digital broadcaster can meet its obligations to children in the digital environment without any foundational basis. While we recognize that digital broadcasters remain public trustees with a responsibility to serve the public interest, the Commission does not explain why the advent of digital television requires a larger obligation on the part of broadcasters who will simply be relinquishing their analog channel for a digital channel.

The existing children's television obligations should apply only to the main program stream of a digital broadcaster. The present rules and policies are more than sufficient to ensure that broadcasters meet the educational and informational needs of children in the digital age. Since 1996, the Commission has regulated children's programming by requiring that all television stations air a minimum of three hours of core educational and informational programming for children per week. [4] Currently, there are also rules in place that regulate the amount of advertising that is aired during children's programming.[5] These existing rules are easily adaptable to digital television whereas the rules proposed in the NPRM will impede technological innovation.

There is no evidence presented in the NPRM indicating that the current 3-hour processing guideline is inadequate to meet broadcasters' public interest obligation to children. In fact, most

[4] 47 C.F.R. § 73.671

[5] 47 C.F.R. §73.670

of the existing evidence demonstrates that the current rules are more than adequate to satisfy our obligations to children. While it is true that digital broadcasters must serve the public interest, the FCC must demonstrate why the current processing guidelines as applied to the primary broadcast stream would not be sufficient to satisfy that obligation. Not only does the NPRM fail to address why the current guidelines are insufficient, but it also fails to address the issue of whether more educational programming is needed or even wanted by viewers.

The Commission should therefore go slowly before it risks threatening the development of digital television before the public, including children, has even had a chance to realize its benefits.

C. Imposing additional regulatory burdens on digital broadcasters exceeds the FCC's mandate under the Children's Television Act of 1990.

The Children's Television Act ("CTA") was passed in 1990. The CTA imposes on broadcasters the duty to serve "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed" to serve those needs. (47 U.S.C. §303(b)(a)(2)).

When the CTA was initially passed, it did not impose any quantitative rules. It was not until 1996 that the Commission adopted the processing guidelines. In fact, one Congressman stated, "The legislation does not require the FCC to set quantitative guidelines for educational programming, but instead requires the Commission to base its decision upon an evaluation of a station's overall service to children."[6] In adopting the processing guidelines in 1996, the Commission narrowly escaped a constitutional violation. It was able to do so by framing the processing guideline as a form of guidance rather than as a mandatory dictate. The guideline

was also issued in a way that purportedly allowed for discretion on the part of broadcasters. In its order implementing the children's programming guidelines, the Commission itself acknowledged that it does not have the authority to impose its own beliefs on what the viewing public ought to hear. By choosing to use the transition to digital to revisit mandatory guidelines, the Commission risks violating its mandate under the CTA. Clearly, Congress fully intended for the Commission to defer to the programming judgments of broadcast licensees.

D. If the Commission imposes new regulations mandating additional children's programming rules on digital broadcasters, it risks running afoul of the First Amendment.

Historically, the Commission has been able to justify a greater amount of regulation in the broadcast arena based on the scarcity of available channels. However, there is no question that the First Amendment does provide substantial protection to broadcasters, and the government is not allowed to dictate content. With the advent of digital television and the availability of multiplexing, it is questionable whether the scarcity rationale can be used to justify increased governmental regulation in the broadcast sphere. Because of the First Amendment protection afforded to broadcasters, the Commission has tended to adopt content-related regulations only when they consist of generalized guidelines, as was the case with the 3-hour processing guideline. The proposals in this NPRM go much further however.

In recent years, many commentators have questioned the continued validity of the scarcity rationale. The Commission itself has questioned the continued validity of the doctrine. In fact, over a decade ago, at least one court recognized that the Commission had determined that

[6] Congressional Record (October 1, 1990) 136, H8537

the scarcity rationale was no longer valid in the existing communications market.[7] Congress, during its passage of the Telecommunications Act of 1996 also noted that the scarcity rationale for government regulation of broadcasting is no longer viable in light of the changes in the marketplace brought about by technology and competition.[8]

While it is constitutionally permissible for the FCC to consider whether a television licensee has met the educational and informational needs of children in the context of its overall programming, it is not permissible for the FCC to dictate the programming schedules of individual broadcast stations. In fact, one of the reasons that the 1996 guidelines passed constitutional muster was the fact that the Commission argued that they were giving broadcasters flexibility as to how to meet their obligations to children. The Commission may inquire as to what stations are doing to meet the needs of children but they may not decide on their own what it is that the public wants to hear and then mandate that broadcasters air that.[9] Therefore, it seems ironic that the Commission would use the transition to digital to justify the implementation of rules that impinge on the editorial discretion of broadcasters.

Because the scarcity rationale no longer holds as much as weight as it once did, it is possible that courts will apply a heightened standard for First Amendment review. The Supreme Court has several times questioned the continued validity of the scarcity rationale that provides

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[7] Meredith Corporation v. F.C.C., 809 F.2d 863, 867 (D.C. Cir. 1987); Syracuse Peace Council v.Television Station WTVH, 2 FCC Rcd 5043, 5052 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989).

[8] Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong. 1st Sess at 54 (July 24, 1995). The House Commerce Committee specifically stated that "the scarcity rationale for government regulation no longer applies."

[9] Turner Broadcasting System v. FCC, 114 S. Ct. 2445, 2470 (1994).

less constitutional protection to broadcasters.[10] Moreover, it is not enough to simply hypothesize a problem. The Commission must demonstrate that the harms it seeks to redress are real and not merely conjectural.[11] While it has been recognized that the government has an important interest in the education of American's children, imposing new rules at this point in time is not the least restrictive means of furthering that interest. The current rules satisfy that interest. The Commission does not have unlimited authority over broadcast program content.[12] Nor can the Commission rely solely on the government's interest in protecting its children to justify constitutional violations. This was attempted with the Communications Decency Act ("CDA") and ultimately failed.[13] In ruling that the CDA was unconstitutional, the Court emphasized that the mere fact that a regulation of speech was enacted to protect or benefit children does not foreclose inquiry into its validity. A statute or regulation must be more than just reasonable. It must also be narrowly tailored and not overbroad.[14] Thus, even when seeking to promote children's interests, the government may not compel a particular type of programming simply because it believes that it would be beneficial without doing so through the narrowest means possible.

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[10] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984); Columbia Broadcasting System, Inc., v. Democratic National Committee, 412 U.S. 94 (1973) (both cases recognizing that regulation over broadcast programming content must be narrow and that licensees must have ultimate discretion over programming choices.)

[11] Turner Broadcasting at 664.

[12] Turner Broadcasting at 651 ("In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations...")

[13] Reno v. ACLU, 521 U.S. 844 (1997).

[14] Id.

E. Section 336 of the 1996 Telecommunications Act prohibits the Commission from imposing additional children's television programming obligations on ancillary and supplemental services.

Should the Commission impose children's programming rules on a digital broadcaster's ancillary and supplementary services, i.e. datacasting or broadband service, it risks contradicting the clear intent of Congress in passing the 1996 Act to end disparate legal treatment for different communications technologies. Section 336(b)(3) of the 1996 Act requires that the FCC apply to any ancillary or supplementary service "such of the Commission's regulations as are applicable to the offering of analogous services by another person." Because Congress passed the 1996 Act with the purpose of converging traditionally distinct communications technologies and services, the Commission should accord similar regulatory treatment to such services. The Commission can do this by subjecting digital broadcasters' ancillary and supplementary services to the same regulatory treatment that it does others providing the same services. Specifically, a digital broadcaster that is using its spectrum to provide datacasting should be held to the same public interest obligations as those who offer Internet access for example. Digital television faces enough competition as it is from the Internet and other media outlets that it should not be saddled with burdens that comparable services do not have to deal with. Furthermore, the 1996 Act also requires digital television licensees who offer ancillary or supplementary services to pay fees that are equivalent to those who obtain their licenses through auctions. Hence, the public trustee model that is used to justify the heavy regulations imposed on television broadcasters is not appropriate in a situation where licensees are paying the government fees for the use of frequencies.

F. The Commission ignores the fact that there are many options in today's marketplace for obtaining educational programming.

The Commission also ignores the existence of other outlets for children's programming such as VCRs, satellite, cable, and the Internet. While the NPRM makes note of the fact that children spend, on average, almost three hours a day watching television, it fails to mention that this time includes time spent watching cable channels. There are ample cable channels that carry children's and educational programming, including some channels that are exclusively for children. According to a study released last year, 97% of children live in homes with a VCR and 74% of children live in homes with subscriptions to cable or satellite television.[15] Additionally, the Supreme Court has also accepted the fact that cable television is as accessible to children as over-the-air broadcasting, and that cable even provides entire networks devoted to children's programming needs.[16] Clearly, the marketplace, and not the government, should dictate what programs television stations choose to offer. In this new millennium, broadcasters face increasing competition from other media, including cable television, satellite services, video, and the Internet. Thus, viewers no longer have only one option when they are seeking a particular type of program. They have a much broader range of options than ever before. This should result in decreased regulation in this area and not increased regulation.

G. Comments on Specific Proposals

The Commission has requested comment as to whether the current processing guideline should apply to one digital broadcasting stream, more than one stream, or to all programming

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[15] Henry J. Kaiser Family Foundation, *Kids and Media at the New Millennium* at 20 (Nov. 1999).

[16] Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 116 S. Ct. 2374, 2386 (1996).

streams a broadcaster chooses to provide. Comment was also sought as to whether the guideline should apply only to free broadcasts or also to those services offered for a fee.

The state broadcaster associations believe that the Commission should apply its current processing guidelines to only the primary digital broadcast stream and not to other services that may be provided whether or not they are free or for pay. It will be far easier for children to find educational programming if it is all on one stream. The CTA mentions "overall programming." This requirement would be met by applying the educational and informational programming requirements only to the primary free channel. Requiring that broadcasters must air children's programming on all streams would prevent broadcasters from even attempting to go into multicasting because of the heavy burden of compliance, thereby impeding the full benefits of digital television. Moreover, some stations might choose to have one of their streams devoted solely to business news or sports, for example. It would not be practical or reasonable to require a broadcaster to air three hours of children's programming on an all news or sports channel. Digital broadcasters should be free to develop specialized channels and some may even decide to devote a channel solely to children's programming. But, they need to be allowed to experiment in order to reach the full fruition of digital television.

Preemptions

The *NPRM* also seeks comments on how the Commission should treat preemptions of core programming by digital broadcasters. It should be noted that most television broadcasters are constrained by their network affiliation agreements and have no say in preemptions by the network for sports programming or breaking news. Under most affiliation agreements, broadcast licensees do not have the discretion of continuing to air their children's programming when preemptions occur because they risk penalties. A broadcaster could face serious financial

repercussions if it were to refuse to air network programming. The issues raised by the Commission's proposal should thus be considered in the context of the pending rulemaking in MM Docket No. 95-92 concerning the programming practices of broadcast networks.

Pay or Play Proposal

The Commission requests comment on Children Now's proposal for the Commission to adopt a "Pay or Play" model which would allow digital broadcasters to meet their core programming obligations through either their own programming or by paying other stations to air those hours for them, or a combination of both. There are many disadvantages to the pay or play model proposed by the Commission. First, the ultimate impact of this proposal would be to disadvantage children's programming by relegating it to noncommercial channels. Second, there is the question of how much broadcasters would have to pay. Next, agreements would have to be negotiated. Moreover, as the Commission itself notes, current FCC rules allow broadcasters to meet their CTA obligation by sponsoring core programs aired by another station in the same market.[17] Yet, there is no evidence that broadcasters are using any kind of pay or play currently or that it is at all a practical alternative. Thus, there is no need to change the rules at this early stage of the game.

Menu Approach

The NPRM also requests comment on a proposal by The Center for Media Education that would impose many of the additional burdens on broadcasters mentioned throughout the NPRM but would allow them to choose how to fulfil that obligation. These options would include providing broadband or datacasting services to local schools, libraries, and community centers. The initial problem with this proposal is that there is no evidence presented to show that the

current amount of core programming is insufficient. Furthermore, requiring that broadcasters provide Internet access to schools and libraries as a means of fulfilling their core programming obligations would be costly for broadcasters and hinder competition because other providers of datacasting or Internet services do not have similar stringent public interest obligations. Because of the heavy financial and administrative burden of such a task, broadcasters might simply decide not to offer such services on their digital streams at all.

Daily Core Programming Obligation

Requiring digital broadcasters to air no less than one hour of children's educational programming each day on the broadcaster's main channel is troublesome in that it directly dictates program content in conflict with First Amendment principles. And again, there is no evidence that indicates that the current 3-hour processing guideline is insufficient. In fact, this was not even a recommendation made by the Advisory Committee but by a member of that committee in a separate statement. Moreover, the time available to broadcasters is seriously limited by their network affiliation agreements and other contractual obligations.

Commercial Limits

The Commission has also requested comment on whether children's advertising limits and policies should apply only to free over-the-air channels or to all digital channels. It also asks whether the public interest obligation should apply to ancillary and supplementary services. As argued above, the existing rules should only be made applicable to a station's primary channel stream. To do otherwise, would stifle innovation and experimentation. The Commission should also hesitate to extend the children's public interest obligations to ancillary and supplementary services because the types of services that will be offered are not foreseeable at this point in time.

[17] 47 C.F.R. §73.671 Note 2.

To impose additional burdens on these ancillary and supplementary services would inhibit and prevent the introduction of such services contrary to the public interest. Also, as noted earlier in these comments, extending children's programming obligations to ancillary and supplementary services would violate the 1996 Act.

Promotions

The Commission also suggests that certain programs viewed by children contain inappropriate promotions and seeks comment on how to deal with unsuitable promotions. First, there is no evidence, other than purely anecdotal evidence, indicating that such promotions are currently a widespread problem. Secondly, there is no discernible nexus between imposing restrictions on promotions during children's programs and the transition to digital broadcasting. Finally, broadcasters are dealing with this issue voluntarily.

Definition of Commercial Matter

The *NPRM* also seeks comment on broader restrictions on the duration of advertising during children's programming. Specifically, the Commission wishes to know whether it should revise its definition of "commercial matter" to include certain types of program interruptions, such as public service messages promoting not-for-profit activities, that do not currently contribute towards the commercial limits. We believe that there is no basis for changing the definition at this time. First, there is no evidence to show that the current definition is inadequate. Secondly, if public service announcements were included in the definition, the effect would be to reduce the number of such announcements during children's programming thereby hurting the public interest. Additionally, expanding the definition of commercial matter would reduce the amount of advertising time available which would lead to decreased revenues and ultimately impact the quality and quantity of children's programming on the airwaves. Finally,

as the Commission notes in its *NPRM*, the FCC's ability to revise the definition is constrained by both the Children's Television Act of 1990 and its legislative history. The definition of "commercial matter" must be used consistently with how it is defined on FCC Form 303.

III. CONCLUSION

In summary, for the reasons set forth above, the State Associations respectfully request that the Commission not impose additional children's programming obligations on digital television broadcasters so early in the game. The technology must first be allowed to develop and flourish. It would be irresponsible for the Commission to turn around from the deregulatory regime it started almost twenty years ago and instead impose unduly burdensome obligations before a problem has even been identified.

Respectfully Submitted,

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